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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 607

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF ROCHESTER,

Petitioner,

—*v.*—

PHILLIP J. McNELLIS, as Trustee of Donald S. Potter, Bankrupt, et al,

Respondent.

Respondent's Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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Facts

Donald S. Potter (hereinafter called Potter) in 1962 was the owner of a newly constructed 300 room motor hotel known as the "Randolph House." For the purpose of making usurious loans, he transferred title to Potter Securities Corp. as his "dummy". (p. 7a)

On April 27, 1962 Defendant entered into an agreement with Potter Securities Corp. on behalf of Potter whereby Defendant was to receive $124,000 for a so-called "mortgage origination fee" for a mortgage loan of $3,100,000 to

be placed on the motel. The loan was closed June 26, 1962. Title to the motel on that day was transferred by Potter Securities Corp. to Randolph House Motor Hotel Corp., the stock of which was owned by Potter. (p. 9a)

On Sept. 21, 1962 title was transferred back to Potter and on the same day he transferred title to First Republic Bldg. Corp. to consummate a sale contract of the motel that he had made with First Republic Bldg. Corp. on May 22, 1962.

On May 28, 1963 Potter and Potter Securities Corp. filed voluntary petitions in bankruptcy and were duly adjudicated bankrupt. On June 25, 1963 McNellis was elected their Trustee. (p. 6a)

On Nov. 22, 1963 Plaintiffs commenced the State Court action alleging that said "mortgage origination fee" was in fact "usury" exacted from Potter in violation of Sec. 380 (e) of the New York Banking Law thereby entitling Potter to recover twice the amount of usury paid, to wit $248,000. Upon his adjudication in bankruptcy this right of recovery passed under Sec. 70 (a).(6) to Plaintiff McNellis as Trustee of Potter. (Record 39)

Defendant answered alleging that the "real borrower" was Potter Securities Corp. and hence the usury claims were not available to a corporation, under Sec. 274 of the N. Y. General Business Law and also that Potter in fact did not pay the $124,000; that $62,000 was paid by Myron S. Melvin and $62,000 deducted out of the proceeds of the loan on closing. (Record 39)

In the State Court action both sides moved for summary judgment. While these motions were pending Plaintiff moved for permission in the State Court action to serve a supplemental complaint alleging that Potter paid to Defendant by his checks, $3,100 on Aug. 2, 1962, $26,022 on Sept. 6, 1962 and $26,022 on Sept. 21, 1962 (all within one

year of the filing of the petition in bankruptcy) without consideration while insolvent in violation of Art. 10 of the Debtor and Creditor Law of New York and Sec. 67 (d) of the Bankruptcy Act. (Record 39)

While said motions in the State Court action were pending, Plaintiffs on May 12, 1964 commenced this action in The United States District Court for the Northern District of New York, combining therein the claim for the $248,000 and separately for recovery of said three payments of $3,100, $26,022 and $26,022. (p. 10a-11a)

On May 28, 1964 Defendant moved for summary judgment said U. S. District Court on the grounds that said State Court action was pending for the same relief or in the alternative that the Federal Court action be stayed until final determination of the State Court action. On June 12, 1964 stay was granted and determination of the motion for summary judgment withheld. (Record 16)

By order of the State Supreme Court on July 9, 1964 summary judgment in favor of Defendant was granted and Plaintiffs motion to serve a supplemental complaint to recover said three payments of $3,100, $26,022 and $26,022 was denied. (Before argument Plaintiff withdrew his motion for summary judgment.) (Record 39)

On Dec. 21, 1965 the motion in Federal Court for summary judgment was resubmitted. Plaintiff consented to dismissal of the action under Sec. 380 (e) of the New York Banking Law as having been decided by the State Court but urged that his cause of action to recover said three payments of $3,100, $26,022 and $26,022 as being made in voilation of Art. 10 of the New York Debtor and Creditor Law and Sec. 67 (d) of the Bankruptcy Act be sustained.

On Jan. 14, 1966 U. S. District Judge Brennan dismissed the entire complaint.

On appeal the Second Circuit Court of Appeals reversed. (Opinion Judge Feinberg, July 27, 1966)

Questions presented in the Petition for Certiorari and Respondent's Answer thereto.

Basically the four questions presented, set forth on page 2 of the Petition for Writ of Certiorari, depend entirely upon whether the Circuit Court correctly ruled that the denial by Justice Ringrose of Plaintiff's Motion to serve a Supplemental Complaint in the State Court Action was not "on the merits."

Respondent submits that the Decision of the Circuit Court was correct, but regardless nothing is contained in the Petition for Writ of Certiorari which falls within the requirements of Rule 37 (5) of this Court and particularly, "no substantial Federal questions are" presented which would justify granting the writ.

Admittedly, Petitioner cannot appeal as a matter of right and therefore the petition should be denied.

All of which is respectfully submitted,

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